UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUY MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR THE PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of September, two thousand and six.

PRESENT:

HON. WILFRED FEINBERG,
HON. SONIA SOTOMAYOR,
HON. PETER W. HALL,

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 03-1229-cr

ANTHONY GREGG,

Defendant-Appellant.

For Defendant-Appellant: JOSEPH W. MARTINI, *of counsel*, Pepe & Hazard LLP, Southport, Connecticut

For Appellee: HARRY SANDICK, Assistant United States Attorney, (Michael J. Garcia, United States Attorney for the Southern District of New York; Celeste L. Koeleveld, Assistant United States Attorney, *of counsel*), United States Attorney's Office for the Southern District of New York, New York, NY

Appeal from the United States District Court for the Southern District of New York (Preska, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**. The government has consented to a remand pursuant to our decision in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). We therefore **REMAND** to enable the district to determine whether to resentence defendant in accordance with that decision.

Anthony Gregg appeals from a judgment and conviction entered on April 11, 2003 in the United States District Court for the Southern District of New York (Preska, *J.*). Gregg was convicted of one count of unlawfully possessing a firearm after having been convicted of a felony, for violation of 18 U.S.C. § 922(g)(1). The jury returned a guilty verdict on January 31, 2003, and the district court sentenced Gregg to a term of 77 months' imprisonment, to be followed by three years of supervised release, and a mandatory $100 assessment.

Gregg raises three arguments on appeal: (1) the district court improperly precluded the "innocent possession" defense to the felon-in-possession charge; (2) the district court improperly admitted into evidence certain post-arrest statements; and (3) the district court erred when it ruled

that he had waived any Fourth Amendment challenges in his federal case by pleading guilty to a prior state charge of criminal impersonation. We resolve Gregg's first two arguments in this summary order and address the "waiver" issue in a separate opinion. We assume familiarity with the underlying facts and procedural history of this case.

A. The "Innocent Possession" Defense

Gregg argues that the district court improperly precluded the defense of "innocent possession." In particular, Gregg contends the jury should have been permitted to consider the circumstances surrounding his possession of the weapon, namely, that he had no criminal intent and was actually on his way to a police precinct to turn it over as part of the city's guns-for-money program.

The felon-in-possession statute provides, in relevant part, that "[i]t shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(1). Under the statute, a felon may be convicted for *knowingly* possessing the firearm. There is no mens rea requirement of *willfulness*, such that the felon-defendant must have a criminal intent in possessing the gun in order to be found guilty. *See* 18 U.S.C. § 924 ("Whoever *knowingly* violates subsection (g) of section 922 shall be fined as provided in this title, imprisoned not more than ten years or both." (emphasis added)). Based on the statutory provisions alone, an "innocent possession" defense is simply untenable.

Nevertheless, Gregg directs our attention to *United States v. Paul*, 110 F.3d 869 (2d Cir. 1997) in which this Court considered, inter alia, under what circumstances a felon-defendant's

possession of a firearm may be too transitory to constitute a violation of § 922(g). There we commented that "[c]ases may be imagined where application of the statute would be at least highly problematic." *Paul*, 110 F.3d at 872. Appellant in *Paul* contended that his possession of the ammunition was too fleeting to constitute the "possession" that the statute was intended to punish. *Id.* Gregg's reliance on *Paul* is unavailing. The *Paul* Court acknowledged there may be circumstances where momentary possession of a firearm perhaps should not incur the penalties of § 922(g)[1]. However, the Court's decision in that case does not support the defense urged here. In *Paul* we found the relatively short time it took for Paul to take a gun from his friend and fire a few shots was not fleeting enough to preclude a finding that he "possessed" the gun for purposes of the statute, notwithstanding his well-intentioned goal of fully discharging the gun of its bullets. In the present case, Gregg was in possession of the handgun from some time prior to his entry into the subway station until his descent into the station, passage through the turnstile, and continuation to one end of the platform where the police confronted him. By Gregg's own admission, he retained the gun in order to receive payment for it. Therefore, the district court correctly declined to instruct the jury on the "innocent possession" defense.

[1] As the *Paul* court noted, "a person might observe a police officer's pistol slip to the floor while the officer was seated at a lunch counter. Picking the weapon up and immediately handing it to the officer would seem a questionable case for application of section 922(g) even if the helpful bystander had a felony conviction." *Paul*, 110 F.3d at 872.

B. Statements Made by Gregg at the Time of Arrest

Gregg challenges the district court's admission into evidence of the following statements at the time of arrest: (1) his alleged statement that he purchased the gun from a "crackhead" for "protection"; and (2) his response to police officers' questions about how to unload the gun. Gregg argues that these statements "were taken in violation of *Miranda*, but were seemingly admitted without objection by [his] trial counsel, although the record is not absolutely clear in this regard."

The record absolutely reveals that trial counsel did not explicitly consent to the statements' admission at trial, but context strongly indicates consent. After conferring with Gregg's attorney, the government reported to the court that there was agreement to have the "crackhead" and "for protection" statements admitted as evidence. Because Gregg's counsel did not object on the record to these representations, the government correctly contends that Gregg has waived the issue on appeal. "If . . . the party consciously refrains from objecting as a tactical matter, then that action constitutes a true 'waiver,' which will negate even plain error review." *United States v. Wellington*, 417 F.3d 284, 290 (2d Cir. 2005) (quoting *United States v. Yu-Leung*, 51 F.3d 1116, 1121-22 (2d Cir. 1995)).

The district court admitted Gregg's statements about how to unload the gun under the "public safety" exception. The district court credited the officer's testimony that he asked Gregg how to unload the gun "to elicit as quickly as possible a safe way to unload the gun and to make the gun safe for transport to the precinct." The Supreme Court has recognized a public safety exception to the rule that statements by a suspect in custody in response to police questioning are typically inadmissible unless preceded by *Miranda* warnings. *See New York v. Quarles*, 467 U.S.

649, 657 (1984). As this Court has noted, the "public safety" exception "clearly encompasses questions necessary to secure the safety of police officers" as well as the general public. *United States v. Estrada*, 430 F.3d 606, 612 (2d Cir. 2005). This is a fact-specific inquiry. *Id.*

Here, the officers arrested Gregg in a subway station and took him to a utility room just off the platform. As this was clearly a public forum with frequent pedestrian traffic (though probably less than usual at 10:40 p.m.), the police were justified in attempting to make the recovered firearm as safe as possible before transporting Gregg out of the station and into a police vehicle. Gregg argues the officers were familiar enough with the firearm that they did not need to question Gregg on its operation. One of the officers testified, however, that he was unfamiliar with the magazine release mechanism on Gregg's gun (and had physical difficulty releasing the magazine) and therefore asked Gregg to show him. The district court's determination with respect to the public safety exception thus was not unreasonable.

The judgment of the district court is **AFFIRMED**. The government has consented to a remand pursuant to our decision in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). We therefore **REMAND** to enable the district to determine whether to resentence defendant in accordance with that decision.

For the Court:

Roseanne B. MacKechine, Clerk

By: _____